

STATE OF CALIFORNIA
FISH AND GAME COMMISSION
INITIAL STATEMENT OF REASONS FOR REGULATORY ACTION
(Pre-publication of Notice Statement)

Amend Section 164
Title 14, California Code of Regulations
Re: Harvesting of Herring Eggs on Kelp

- I. (a) Date of Initial Statement of Reasons: May 11, 2002
- II. Dates and Locations of Scheduled Hearings:
 - (a) Notice Hearing: Date: June 20, 2002
Location: South Lake Tahoe, CA
 - (b) Discussion Hearing: Date: August 2, 2002
Location: San Luis Obispo, CA
 - (c) Adoption Hearing: Date: August 30, 2002
Location: Oakland, CA
- III. Description of Regulatory Action:
 - (a) Statement of Specific Purpose of Regulation Change and Factual Basis for Determining that Regulation Change is Reasonably Necessary:

Under existing law, herring eggs on kelp may be taken for commercial purposes only under a revocable, nontransferable permit, subject to such regulations as the Fish and Game Commission shall prescribe. Current regulations specify: permit limitations; season; fishing area; permittee categories and qualifications; permit conditions; royalty fees; permit application procedures; permit performance deposit requirements; gear, fishing and harvesting restrictions; fishing quotas; landing and processing requirements; and permit suspension conditions and procedures. In addition, current regulations limit the number of permits that can be issued.

The proposed regulatory changes will establish fishing quotas for the 2002-03 herring eggs on kelp fishing season. Individual herring eggs on kelp quotas will depend on the total herring fishery quota for San Francisco Bay established by the Commission under Section 163, Title 14, CCR. The proposed 2002-03 herring fishery quota for San Francisco Bay is 3,540 tons (10 percent of the estimated spawning biomass for the 2001-02 season); this results in a 6.2-ton individual herring eggs on kelp quota for a "CH" permittee and a 1.8-ton individual quota for a non-"CH" gill net permittee. This represents a decrease in the individual quota from the 2001-02 season of 24 percent and 14 percent, respectively, for a "CH" and non-"CH" gill net permittee.

Other changes relating to definitions are recommended to improve the clarity of the regulations or provide for the efficient harvest and orderly conduct of the fishery and for the protection of the resource. Specifically, the proposed

changes clarify the description of a line as it pertains to the herring eggs on kelp fishery and the length of a line that may be used in herring eggs on kelp fishing. Minor editorial changes are made for the purposes of clarity and consistency with other regulations.

The commercial herring fishery in San Francisco Bay is closely regulated through a catch quota system to provide for adequate protection and utilization of the herring resource. The Department conducts annual assessments of the size of the spawning population of herring in San Francisco Bay. These data serve as the basis for establishing a fishing quota for the next season. In addition, annual management recommendations to improve or provide for the efficient harvest and orderly conduct of the herring eggs on kelp fishery are solicited from interested fishermen and individuals at public meetings and from the Director's Herring Advisory Committee, which is composed of representatives from the commercial herring fishing industry. The proposed amendments to Section 164, Title 14, CCR reflect both Department and public recommendations.

The annual herring fishing quota is allocated solely to the herring fishery authorized pursuant to Section 163. Consequently, all herring eggs on kelp permittees must hold a herring permit. To fish herring eggs on kelp, a herring permittee must waive his or her herring fishing privileges under Section 163 and "exchange" his or her "share" of the herring quota for an equivalent herring eggs on kelp quota. The current factor used to convert an equivalent amount of resource from the sac roe fishery to the herring eggs on kelp fishery is 0.2237.

Annual fishing quotas have been limited to a total commercial catch of not more than 20 percent (exploitation rate) of the spawning biomass to ensure adequate protection for the herring resource and provide for the long-term yield of the fishery. In practice, the exploitation rate has typically been set at 15 percent of the previous season's spawning biomass estimate. Exploitation rates are not determined by a fixed mathematical formula, but are modified based on additional biological data collected each season, such as growth rates of herring, strength of individual year-classes, and predicted size of incoming year-classes (i.e., recruitment). For example, in response to poor recruitment and unfavorable oceanographic conditions, exploitation rates for the 1992-93, 1993-94, 1994-95, 1997-98, and 2000-01 fishing seasons in San Francisco Bay were set at less than 15 percent (12, 10, 12, 12 and 10 percent, respectively).

The 2001-02 spawning biomass estimate for San Francisco Bay is 35,400 tons (including catch), which is a 5 percent decrease from last season's estimate and well below the 24-year average of 52,996 tons. The San Francisco Bay stock continues to respond to favorable oceanic conditions following the devastation resulting from the 1997-98 El Niño event. Herring samples taken this season indicate slightly higher than average recruitment of young fish (2- and 3-year-olds combined), and the largest showing of 1-year-old fish in the spawning population in 28 years. Older fish (4-, 5-, and especially 6- and 7-year-olds) were well below average abundance this season. This is a primary reason for the 2001-02 season's below-average spawning biomass.

A fishing quota of 3,540 tons, representing 10 percent of the 35,400-ton estimated spawning biomass, is proposed for the 2002-03 San Francisco Bay herring fishery. The conservative 3,540 ton quota proposal accounts for the below-average 2001-02 spawning biomass estimate, less abundant older age classes, and irregular spawning behavior. Additionally, the Department considered the currently emerging El Niño conditions that may result in unfavorable oceanic conditions vital to the growth and survival of herring.

Within the overall quota in San Francisco Bay, separate quotas are established for each gill net platoons (i.e., December, Odd and even). The overall quota is divided among the three platoons in proportion to the number of permits in each platoon. In 1994, the commission decided to provide herring eggs on kelp permittees possessing "CH" permits with a herring eggs on kelp quota equal to approximately 0.79 percent of the overall quota. If the quota for the Bay is set at 10 percent of the estimated spawning biomass, as recommended by the Department, the individual herring eggs on kelp quota for a "CH" permittee will be 6.2 tons and the individual quota for a gill net permittee will be 1.8 tons. These represent a decrease in individual quotas of 24 percent for a "CH" gill net permit from the 2001-02 season quota (7.9 tons), and 14 percent for a non-"CH" gill net permit from the 2001-02 season quota (2.1 tons).

The Department, with support from industry, proposes to modify existing language in Subsection (j) Method of Take which describes the amount of area that a line may occupy in herring eggs on kelp fishing. The change will describe the area that a line may occupy as a line length in order to better describe how much line may be used to suspend kelp. The intention of allowing a line to be fished is to allow fishing in areas where raft placement is difficult and/or costly. The intention is not to allow more area than would be utilized by a raft. Most of the rafts are approximately 60 by 40 feet square, with 30 lines across per raft. Given these dimensions, a line of 1200 feet (40 feet width of raft by 30 line across) would be a sufficient length to allow. The proposed length of 1200 feet does not provide for more surface area than was previously allowed (2,500 square feet), rather, it provides for a definable length that the permittees and Department personnel can readily identify.

Current regulations describe a line as a "...continuous piece of line...". This description has caused some confusion among Department enforcement and industry as to what constitutes a "continuous" piece of line. The original intention of this regulation was to restrict the number of lines being used by each permittee at different locations, not to restrict the method by which a permittee constructs a line used for kelp suspension. In an effort to clarify the regulation, the Department proposes to omit the word "continuous" from the regulatory language. The proposed change in regulatory language would incorporate the above mentioned line length description in Subsection (j) Method of Take. The intention of this change is to allow for the construction of a 1200 foot piece of line from several smaller pieces without forcing the permittee to incur undue costs. Beginning and end points of the line shall be marked as specified in Section 164 (j)(1) of Title 14, CCR.

Minor editorial changes in language and form references are proposed to correct or clarify the existing regulatory language. The proposed

amendment corrects the Release of Property form number, MRR/WLP (10/93) to FG-MR-674 (Rev. 5/02), wherever specified in Section 164, Title 14, CCR, to reflect revisions made for clarification and simplification.

- (b) Authority and Reference Sections from Fish and Game Code for Regulation:

Authority: Sections 5510, 8389, 8553 and 8555, Fish and Game Code.

Reference: Sections 7850, 7850.5, 8043, 8053, 8389 and 8550-8556, Fish and Game Code.

- (c) Specific Technology or Equipment Required by Regulatory Change:

None.

- (d) Identification of Reports or Documents Supporting Regulation Change:

- (1) Minutes, Director's Herring Advisory Committee Meeting, March 27, 2002, Sausalito, California.
- (2) Summary, Public Meeting, Pacific Herring Fisheries, April 4, 2002, Sausalito, California.
- (3) Summary, Herring Eggs on Kelp (HEOK) Ad-Hoc Meeting, March 6, 2002, Sausalito, California.
- (4) Informational Handout Packet for herring fisheries in (a) San Francisco Bay; (b) Tomales Bay; (c) Humboldt Bay, Crescent City Harbor.
- (5) Release of Property (MRR/WLP 10/93) Revised Form Number (Old Form) and Release of Property (FG-MR-674 (Rev. 5/02) (Revised Form)

- (e) Public Discussions of Proposed Regulations Prior to Notice publication:

- (1) Herring Eggs on Kelp (HEOK) Ad-Hoc Meeting, March 6, 2002, Sausalito, California.
- (2) Director's Herring Advisory Committee Meeting, March 27, 2002, Sausalito, California
- (3) Public Meeting, Pacific Herring Fisheries, April 4, 2002, Sausalito, California.

IV. Description of Reasonable Alternatives to Regulatory Action:

- (a) Alternatives to Regulation Change: See Draft Supplemental Environmental Document - Pacific Herring Commercial Fishing Regulations.
- (b) No Change Alternative: See Draft Supplemental Environmental Document

- Pacific Herring Commercial Fishing Regulations.

- (c) Consideration of Alternatives: In view of information currently possessed, no reasonable alternative considered would be more effective in carrying out the purposes for which the regulation is proposed or would be as effective and less burdensome to the affected private persons than the proposed regulation.

V. Mitigation Measures Required by Regulatory Action:

The proposed regulatory action will have no negative impact on the environment; therefore, no mitigation measures are needed.

VI. Impact of Regulatory Action:

The potential for significant statewide adverse economic impacts that might result from the proposed regulatory action has been assessed, and the following initial determinations relative to the required statutory categories have been made:

- (a) Significant Statewide Adverse Economic Impact Directly Affecting Businesses, Including the Ability of California Businesses to Compete with Businesses in Other States:

The proposed action will not have a significant statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states.

The proposed action is based on regulations that are already in place. The average quota over the history of the herring eggs on kelp fishery in San Francisco Bay (thirteen seasons) is 111.6 tons per season (all individual quotas combined). The proposed quota is significantly less than the long-term average, and thus, in comparison to the long term average, will have a negative economic impact on individual fishermen in the short-term. However, there is no guarantee that the quota will be caught; the herring eggs on kelp season quota has only been reached in three seasons (i.e., 97.4, 99.7 and 100 percent of the quota was harvested in the 1989-90, 1993-94 and 1995-96 seasons, respectively). When compared to last season's catch of 45.3 tons, the proposed 57.6 ton herring eggs on kelp quota (derived from the 3,540 ton quota for San Francisco Bay) would represent a 27-percent increase. The proposed decrease in the San Francisco Bay quota (compared to the 2001-02 season quota) may have a significant, but unquantifiable, negative impact on the buyers of herring eggs on kelp and possibly on some business that provide goods and services to the permittees. In the long-term, there is a balance between seasons when resource abundance and fishing quotas are low and seasons when resource abundance and finishing quotas are high.

The proposed corrections in the citations of sections of the Fish and Game Code or Title 14 are being made for the sake of clarity and will not have an economic impact.

- (b) Impact on the Creation or Elimination of Jobs Within the State, the Creation of New Businesses or the Elimination of Existing Businesses, or the Expansion of Businesses in California:

None.

- (c) Cost Impacts on a Representative Private Person or Business:

The agency is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

- (d) Costs or Savings to State Agencies or Costs/Savings in Federal Funding to the State:

None.

- (e) Nondiscretionary Costs/Savings to Local Agencies:

None.

- (f) Programs mandated on Local Agencies or School Districts:

None.

- (g) Costs Imposed on Any Local Agency or School District that is Required to be Reimbursed Under Part 7 (commencing with Section 17500) of Division 4:

None.

- (h) Effect on Housing Costs:

None.

INFORMATIVE DIGEST\POLICY STATEMENT OVERVIEW

Under existing law, herring eggs on kelp (HEOK) may be taken for commercial purposes only under a revocable, nontransferable permit, subject to such regulations as the Fish and Game Commission shall prescribe. Current regulations specify: permit limitations; season; fishing area; permittee categories and qualifications; permit conditions; royalty fees; permit application procedures; permit performance deposit requirements; gear, fishing and harvesting restrictions; fishing quotas; landing and processing requirements; and permit suspension conditions and procedures. In addition, current regulations limit the number of permits that can be issued.

The proposed regulatory changes will establish fishing quotas for the 2002-03 herring eggs on kelp fishing season. Individual herring eggs on kelp quotas will depend on the total herring fishery quota for San Francisco Bay established by the Fish and Game Commission under Section 163, Title 14, CCR. The proposed 2002-03 total herring fishery quota for San Francisco Bay is 3,540 tons (10 percent of the estimated spawning biomass for the 2001-02 season); this results in a 6.2-ton individual herring eggs on kelp quota for a "CH" permittee and a 1.8-ton individual quota for a non-"CH" gill net permittee. These represent a decrease in individual quotas of 24 percent for a "CH" gill net permit from the 2001-02 season quota (7.9 tons), and 14 percent for a non-"CH" gill net permit from the 2001-02 season quota (2.1 tons).

Other changes relating to are recommended to provide for the efficient operation and orderly conduct of the fishery, improve the clarity of the regulations and for the protection of the resource. The following is a summary of those proposed changes.

- Modify Subsection (j) Method of Take to describe the area a line used for HEOK fishing may occupy as a line length rather than a square foot area.
- Clarify the description of a line used in HEOK fishing by omitting the word "continuous" from the description of a line in Subsection (j) Method of Take.

Minor editorial changes in language and form references are proposed to correct or clarify the existing regulatory language.

PROPOSED REGULATORY CHANGES TO SECTION 164, TITLE 14, CCR:
HARVESTING OF HERRING EGGS ON KELP

1) Subsection (h)(1) of Section 164, Title 14, CCR, is amended to read:

(h) Permit applications. Each applicant for a herring eggs on kelp permit shall:
(1) Completely fill out and submit the required department Herring-Eggs-on-Kelp Permit Application (FG 1406 (4/99 2/02)), which is incorporated by reference herein (available at the department's San Francisco Bay Area Marine Region office), for the season to which the application applies. No person shall submit more than one application per season. Applications shall include a performance deposit as specified in subsection (i), and shall be delivered to the department's San Francisco Bay Area Marine Region office or postmarked no later than 5 p.m. on August 1 of each year.

2) Subsection (j) of Section 164, Title 14, CCR, is amended to read:

(j) Method of Take. Herring eggs may only be taken by harvesting giant kelp (*Macrocystis* sp.), with spawn (i.e., eggs) attached, which has been artificially suspended using the following two methods: rafts and/or lines, a technique commonly known as the "open pond" method. For the purpose of this Section, a raft is defined as a temporary, mobile structure with a metal, wood or plastic frame. The total surface area of each raft is not to exceed 2,500 square feet. Rafts used by a licensed herring eggs on kelp permittee, prior to the 1995-96 season, are exempt from these size specifications. Such rafts may not be modified to exceed 2,500 square feet total surface area. Any new raft built after the 1995-96 herring eggs on kelp season must meet the specified dimensions. A line is defined as a continuous piece of line of no more than 1200 feet in overall any length that is suspended under a suitable permanent structure (e.g., pier or dock), or between two permanent structures (e.g., piers or docks). Each end of the line must be attached to a permanent structure. ~~The total surface area that each line may occupy is not to exceed 2,500 square feet.~~ Kelp lines suspended from a permanent structure (e.g., pier or dock) shall not be placed as to hinder navigation. If kelp lines are suspended under a permanent structure (e.g., pier or dock), or if a raft is tied up to a permanent structure (e.g., pier, dock or rock wall, natural stationary shoreline structures), the permittee shall obtain prior written approval from the appropriate owners or controlling agency (e.g., wharfinger, Coast Guard, Navy or private owner). Buoys are not permanent structures.

3) Subsection (j)(4) of Section 164, Title 14, CCR, is amended to read:

(4) The total amount of herring eggs on kelp that may be harvested by each permittee shall be based on the previous season's spawning population assessment of herring in San Francisco Bay, as determined by the department. This assessment is used to establish the overall herring fishing quotas pursuant to Section 163 of these regulations.

The total amount of herring eggs on kelp that may be harvested by an individual possessing a gill net permit issued pursuant to Section 163 of these regulations shall be 2.41.8 tons per season. The total amount of herring eggs on kelp that may be harvested by an individual possessing a "CH" permit issued pursuant to Section 163 of these regulations shall be 7.96.2 tons per season.

4) Subsection (k)(8)(B) Section 164, Title 14, CCR, is amended to read:

(B) The landing receipt for each load shall include all information required by Fish and Game Code Section 8043. Tally sheets shall indicate the serial number, the tare weight of the bin or tote, the net weight of the product (eggs on kelp), excluding the salt and brine and the gross weight of each bin or tote. Filled bins or totes shall be weighed when landed on-shore, or before they are moved from the premises if processing takes place on-shore. The weight tally sheet shall be retained by the permittee for one year and shall be available at all times for inspection by the department. All herring eggs on kelp landed in excess of any established permit quota shall be forfeited to the department by the signing of an official Release of Property form (~~Form MRR/WLP [revised 10/93]~~ FG-MR-674 (Rev. 5/02)), which is incorporated by reference herein). Such excess of herring eggs on kelp shall be sold or disposed of, and the proceeds from all such sales shall be paid into the Fish and Game Preservation Fund.

NOTE

Authority cited: Sections 5510, 8389, 8553 and 8555, Fish and Game Code.

Reference: Sections 7850, 7850.5, 8043, 8053, 8389 and 8550-8556, Fish and Game Code.